



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
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CHICAGO, IL 60604-3590

MAR 29 1996

REPLY TO THE ATTENTION OF:

R-19J2

Ms. Lois J. Schiffer
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
Ben Franklin Station
Post Office Box 7611
Washington, D.C. 20044

RE: Expedited Referral for Obtaining a CERCLA Section 104
Order In Aid of Access for Access at the
G & H Industrial Landfill Site, Macomb County, Michigan

Dear Ms. Schiffer:

The United States Environmental Protection Agency ("U.S. EPA") hereby requests that the U.S. Department of Justice ("U.S. DOJ") commence proceedings for the purpose of obtaining an immediate order in aid of access under Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), to a portion of the G & H Industrial Landfill Site (the "Site"), Macomb County, Michigan. This action is necessary to enable the Settling Defendants, in U.S. v. Browning Ferris Industries, et al., 92 CV 75460DT (E.D. Mich., entered June 30, 1993) (the "Consent Decree") (Attachment "A") to timely begin to construct the remedy selected in the record of decision signed on December 21, 1990 ("ROD") (Attachment "B") (as amended by the explanation of significant differences ("ESD"), signed March 13, 1992) (Attachment "C").

U.S. EPA seeks an expedited referral because it has repeatedly been refused access to and over two pipeline easements (which are possessed by the Detroit Water and Sewerage Department ("DWSD")) that run through the Site. Access to and over the easements are essential for the construction by the Settling Defendants of the final cleanup action (consisting, in part, of a slurry wall, a groundwater extraction and treatment system, and a landfill cap, all as more fully described in the Consent Decree, the ROD, and the ESD). An immediate order in aid of access is necessary, because the DWSD refused to provide timely and voluntary access to the easement, unless certain unacceptable conditions are agreed to in an access agreement by U.S. EPA.

The U.S. EPA has secured access to the majority of the Site as described in U.S. v. Estate of Forster, 88-CV-70613-DT (E.D.

Mich., entered Nov. 25, 1992). Although the pipeline easements are only a small portion of the overall site, access to the entire Site is necessary in order to construct the remedy set forth in the Consent Decree, ROD, and ESD, and to otherwise respond to a release or threat of release of hazardous substances from the Site. The Settling Defendants have taken bids from contractors that may be retained to construct the remedy. The Settling Defendants, however, have not accepted the bids and have not entered into any contracts, because of uncertainty over when construction may begin in light of DWSD's denial of access. Construction delays have an effect on the cost of construction. Construction could begin as early as April 1996 if access is immediately secured.

I. HISTORY OF THE G & H INDUSTRIAL LANDFILL SITE

A. Site Description

The G&H Industrial Landfill ("G&H") site is located southwest of the intersection of Ryan Road and 23-Mile Road in Shelby Township, Macomb County, Michigan. The G&H site is approximately 3 miles northwest of Utica and approximately 20 miles north of Detroit. The 70-acre G&H landfill is situated to the north and east of the nearby Clinton River (see Figure 1 attached to the ROD). The river provides a habitat for several important fish species and other aquatic life. A portion of the former Rochester-Utica State Recreational Area (recreational area), which is located south of the site, has been impacted by past landfill operations. The recreational area, which is now administered by Shelby Township, is used for hiking, fishing (in the Clinton River), and for other recreational purposes by area residents and visitors. The recreational area includes wetlands and woodland habitats which support numerous species of migrating birds and other wildlife.

The surrounding area is generally suburban; residential neighborhoods are located to the north and to the east within several hundred feet of the landfill. A subdivision of about 80 homes is located in the eastern area, and a newer subdivision of more than 25 homes is located in the northern area. Several light industrial facilities are located to the southeast, directly adjacent to the landfill. The upper sand and gravel aquifer used to be the source of drinking water for some of the eastern area residences and the industries. Now, all of the homes and businesses are being served by the municipal water supply.

Prominent site features include the three phases of the landfill (Phases I, II, and III), as shown in Figure 1 attached to the ROD. The 44-acre Phase I landfill area, bounded by a 10-acre automobile salvage yard (junkyard) to the northeast, the abandoned Conrail right-of-way to the south, the light industrial

area to the southeast, and the residential area north of 23-Mile Road, is characterized by fairly flat but uneven terrain and scrub vegetation. The 17-acre Phase II landfill area, which was begun after Phase I had been filled in, is also characterized by uneven terrain and scrub vegetation. Phase II is bounded by the Conrail right-of-way to the north and the DWSD pipeline easement(s) to the west. Phase II has a steep southern slope that terminates in the woodlands in the recreational area. The 8-acre Phase III landfill area, which represents the final phase of landfill operations, has little surface vegetation and is bounded by the DWSD pipeline easement on the east. Phase III has a steep southern and western slope that terminates in the woodlands adjacent to the Clinton River and in a portion of the river's 100-year floodplain.

The DWSD easement contains a 96-inch (diameter) water supply pipeline, a 96-inch sewer, and a 24-inch interceptor sewer. The DWSD completed construction of the water supply line in 1969, while the landfill was in operation, and serves as the main distribution line from Lake Huron to the Detroit municipal water system. The 24-inch interceptor sewer, which serves Shelby Township, is connected to a 96-inch regional interceptor sewer which runs beneath portions of the Phase II and Phase III landfill areas (see Figure 2 to the ROD). The regional interceptor sewer serves Oakland County and connects to the DWSD main sewage treatment plant. No landfill material was placed over the water supply pipeline.

B. Site History

A sand and gravel quarry existed at the G&H site up to the early 1950s. In mid 1950, after quarry operations had ceased, the landowner leased the property to the G&H Industrial Fill Company. Landfill operations began in 1955 and ended in 1973, when the final phase had been filled to capacity. The landfill operators accepted municipal refuse, solid industrial wastes, and liquid industrial wastes including solvents, paints, varnishes, lacquers, and waste oils, for disposal at the site.

Waste oil and water mixtures, delivered to the site by rail and by tank truck, were disposed of at the landfill from approximately 1955 to 1967. Initially, the operators attempted to reclaim the oil by pumping the oil and water mixtures to settling ponds located in the Phase I landfill area (see Figure 2) and skimming off the recoverable oil for resale. Several attempts were made to reclaim the oil, but none were reported to be successful. Thereafter, the oil was reportedly allowed to settle and the volatile components were allowed to evaporate. The resulting sludge was periodically removed and buried in the landfill.

In the early 1960s, local residents lodged complaints with the Macomb County Health Board ("MCHB") regarding sewage odors emanating from south of the landfill area. An initial site inspection by the MCHB did not locate the source of the odors; however, a joint site surveillance by the MCHB and the Michigan Water Resource Commission ("MWRC") discovered that groundwater seeps south of the railroad tracks emitted a strong chemical odor. As a result, the MWRC conducted a groundwater and surface water investigation in July 1965. At that time, the MWRC noted that the landfill operation accepted waste oils and municipal trash, along with solvents, paints, etc., which were delivered in 55-gallon drums, and identified three areas in the Phase I landfill into which the contents of the drums were dumped (see Figure 2 to the ROD). (Subsequently, the landfill operators have indicated that solvent disposal ponds were located throughout the Phase I landfill area and the junkyard.)

The MWRC investigation determined that groundwater (in the upper aquifer) flowed generally to the south and concluded that liquid waste disposal operations were responsible for contamination of the groundwater seeps south of the railroad tracks. As a result of this investigation, a Consent Order was issued by the Macomb County Circuit Court in May 1966 prohibiting the disposal of paints, varnishes, paint thinners, and lacquers in the G&H landfill. Waste oils were not addressed by this Consent Order.

A second MWRC investigation in November 1966 concluded that the waste oil disposal/reclamation activities at the landfill were also contributing to groundwater contamination. Based upon these findings, the Macomb County Circuit Court issued a Consent Order in 1967 banning the disposal of any liquid industrial wastes at the landfill.

At about this time, DWSD began construction of the water supply pipeline through an easement located on the western portion of the landfill property.

After liquid industrial waste disposal allegedly ceased, the G&H site continued to operate as a sanitary landfill from 1967 until operations ceased in 1973. The G&H landfill was also known as the Shelby Township dump, operating under various State of Michigan permits from 1967 to 1973. Although landfill operations ceased in 1973 (because each phase had been filled to capacity), no final closure plan was prepared or implemented.

The state investigated the site several more times between 1973 and 1979. These sampling events documented potential contamination of the Clinton River by leachate seeps west of the Phase III landfill area and by oil seeps south of the Phase I landfill area.

Pursuant to CERCLA, the U.S. EPA inspected the site in 1982. Subsequent to the submittal of the Site Inspection report in August 1982, the U.S. EPA placed the site on the National Priorities List ("NPL") in September 1983.¹

C. Enforcement History

Most of the G&H landfill business records were destroyed in an office fire in December 1974. U.S. EPA obtained information regarding potentially responsible parties ("PRPs") from responses to information request letters sent to alleged landfill users, depositions obtained from the landfill operator, and depositions taken from alleged transporters to the site. Using responses to information requests received in 1986-1987, the U.S. EPA identified an initial group of 12 PRPs, including alleged generators, the owner of the property, and the operators of the G&H landfill. Information regarding additional PRPs was obtained by a core group of PRPs and presented to the U.S. EPA for follow-up. Currently, the DWSD is not being treated as a PRP and DWSD is not a signatory to any of the Site consent decrees.

The ROD was issued on December 21, 1990. On January 11, 1991, U.S. EPA issued Special Notice to the PRPs. On March 13, 1993, the ESD was signed. After a period of negotiations, a Consent Decree was entered into among the United States, U.S. EPA, and the Settling Defendants providing for the Settling Defendants to

¹ U.S. EPA conducted four removal actions at the G&H landfill pursuant to its authority under CERCLA. The first removal action began in July 1982. Its purpose was to prevent public access to the contaminated groundwater and oil seeps south of the Phase I landfill area and to prevent the migration of oil contaminated with polychlorinated biphenyls (PCBs). A second removal action, which began in July 1983, was initiated to alleviate oil migration. In April 1986 the Michigan Department of Natural Resources ("MDNR") noted that the clay barriers and site fences were no longer successful at preventing the migration of the oil or public access to the oil. The third removal action, initiated in May 1986 addressed these problems. As the Remedial Investigation (RI), then in progress continued, it became apparent that the surface soils on the landfill were contaminated and that public access to the entire site could be creating a health hazard. Accordingly, a fourth removal action was initiated in July 1987. At this time, a chain-link fence was installed around the perimeter of the entire site, including the portions of the recreational area affected by the oil seeps. Oils were recovered periodically and stored in the building. In April 1989, approximately 2,400 gallons of a PCB-contaminated oil and water mixture were transported to an off-site thermal destruction facility for proper disposal.

design and construct the selected remedy for the G&H site. The Consent Decree was entered by the Court on June 30, 1993.

The Settling Defendants have been cooperative, and have completed all tasks required of them. The design is 100% complete.

D. Scope of the Selected Remedy

U.S. EPA identified the principal threats to human health and the environment at the G&H landfill site to be the groundwater contaminant plume and the solvent/oil-contaminated soil and landfill debris in the Phase I landfill area. The solvent/oil-contaminated soil and landfill debris are the major sources of groundwater contamination. The Phase II and Phase III landfill areas are considered to be a lower-level, long-term threat, primarily as a further source of groundwater contamination.

The remedy as specified in the ROD contemplated the following primary elements:

- 1) Construction of a landfill cover (cap) in compliance with Michigan State Hazardous Waste Rule 299.9619, as specifically described in the ROD;
- 2) Construction of a source containment system consisting of a subsurface vertical barrier wall (slurry wall) around the perimeter of the landfill areas and along each side of the DWSD pipeline easement which traverses the site. The slurry wall is to be supplemented with extraction wells installed in the upper aquifer inside the containment system; and
- 3) Extraction and treatment of the groundwater containment plume outside of the slurry wall to meet Federal drinking-water standards and State groundwater quality criteria.

The ESD modified the selected remedy as follows:

- 1) The thickness of the cap could be reduced depending on the results of modeling during design;
- 2) Changes in the locations and extent of the slurry walls and groundwater extraction wells; and
- 3) A change in certain groundwater clean-up standards.

As presented in the ESD, the cleanup remedy no longer contemplates construction of slurry walls on both sides of DWSD's pipeline. Although DWSD received notice of the pending change to the remedy prior to signature of the ESD, DWSD did not submit comments on, or object to, this change during the public comment

period on the ESD. Only years later, when design was nearly complete, did DWSD voice concerns over the remedy. As discussed below, the cause of DWSD's concern appears to have more to do with DWSD's fears over public perception than with the remedy's efficacy.

II. PERTINENT STATUTES

Pursuant to Section 104 of CERCLA, U.S. EPA has the authority to enter private property to conduct investigations, studies, and cleanups where there is a reasonable basis to believe that there may be a release or threat of release of a hazardous substance pollutant or contaminant. Section 104(e)(3) of CERCLA allows U.S. EPA to enter places where hazardous substances may be located or where entry is needed to determine the need for response or appropriate response, or to effectuate a response under CERCLA.

Under Section 104(e)(6) of CERCLA, U.S. EPA has the power to enforce its authority described above. Specifically, U.S. EPA can request the "Attorney General to commence a civil action to compel compliance with a request or order" for entry and access. 42 U.S.C. § 9604(e)(5)(B). Further, Section 104(e)(5)(B)(i) provides that, in granting an immediate order for entry and access, "the court shall enjoin such interference or direct compliance with orders to prohibit interference with entry or inspection unless under the circumstances of the case the demand for entry or inspection is arbitrary and capricious, and abuse of discretion, or otherwise not in accordance with law."

III. NATURE OF THE CONTROVERSY

On May 15, 1995, the DWSD issued a letter to U.S. EPA describing its unease with the final design, specifically the manner in which the cleanup remedy was to be constructed in or around the watermain easement. DWSD also demanded that the Settling Defendants remove and relocate the pipeline to prevent contamination of the line with solvents. U.S. EPA responded by offering to facilitate a meeting between the DWSD and the Settling Defendants for purposes of an information exchange.

A meeting was held between DWSD (including DWSD Director Gordon), U.S. EPA, and Conestoga-Rovers and Associates ("CRA"), the Settling Defendants' contractor, on July 18, 1995, in DWSD's offices. There, DWSD reiterated its concern with the remedy and requested that certain information be provided to it in order to more fully evaluate the final design. Also, U.S. EPA was informed by DWSD that DWSD wanted U.S. EPA to compel the Settling Defendants to relocate the water main outside of the landfill. DWSD stated that relocation was necessary because of the risk that contamination could come into contact with the water main, and thus damage the main. DWSD also asserted that if the water

main failed, contamination would be washed into the main and would contaminate the main and the distribution system. DWSD later estimated that the cost of such a relocation approached \$17 million. U.S. EPA and CRA disagreed with DWSD's assertions regarding the safety and protectiveness of the remedy.

U.S. EPA informed the DWSD that U.S. EPA believes the current remedy to be protective of human health and the environment, and that contamination will not come into contact with the watermain. Thus, it is not likely that the main will be damaged by contamination. Accordingly, U.S. EPA has no authority to require the Settling Defendants to move the watermain. U.S. EPA also informed DWSD that in the event that the main did fail, then to the extent that the failure washed out part of the remedy (the cap, for example), DWSD would be responsible for repairing the remedy. Further, to the extent that a watermain failure resulted in the spread of contamination (for example in the main, or any other location), then DWSD would also be responsible for that clean-up.

On August 18, 1995, in connection with implementing the G&H remedy, the Settling Defendants submitted to the DWSD an application for a permit for an easement encroachment. The Settling Defendants' application requested a permit to encroach on both the water and the sewer main easements. The permit applications described the work to be done at the site, and the length of time for which access is required.

Rather than acting on this application, the DWSD rejected the application and insisted that the Settling Defendants submit two separate applications, one for a permit to encroach on the watermain easement and one for a permit to encroach on the sewer line easement. The Settling Defendants complied with the demand and submitted two separate applications on November 27, 1995. [Attachment "D".]

Also, on August 18, 1995, DWSD issued a letter to U.S. EPA complaining about U.S. EPA's lack of response to its demands. In reply, U.S. EPA pointed out that it is U.S. EPA's belief that because the remedy is protective of human health and the environment, and because the main is protected by the remedy, DWSD's real concern must be with public perception. DWSD's concern in this regard is not an issue for U.S. EPA, however. Moreover, this concern is undercut by the fact that the DWSD constructed the water and sewer mains through the middle of the landfill while it was still in operation and after the Macomb County Circuit Court issued a Consent Order in 1967 banning the disposal of any liquid industrial wastes at the landfill (see part B, above). U.S. EPA therefore requested that DWSD act on the Settling Defendants' permit application in a timely fashion to prevent further delays in construction of the cleanup remedy.

After resubmittal of the two encroachment applications, many months passed without action, causing the Settling Defendants to ask that U.S. EPA aid the Settling Defendants in obtaining action on the permit applications.

IV. U.S. EPA REQUEST FOR ACCESS

On December 11, 1995, William Muno, Director of the Superfund Division of Region V, U.S. EPA requested DWSD provide voluntary access to the watermain and sewerline easements at the Site for purposes of allowing the Settling Defendants construct the selected remedy. [Attachment "E".] DWSD did not return a signed access agreement. DWSD also did not act on the pending permit applications of the Settling Defendants. Accordingly, on February 5, 1996, Mr. Muno again wrote to DWSD requesting access. [Attachment "F".] In response, on February 5, 1996, Counsel for the DWSD faxed to Counsel for U.S. EPA a modified access agreement containing numerous conditions upon which DWSD conditioned its consent. [Attachment "G".] Counsel for DWSD and U.S. EPA conducted several subsequent negotiations in an effort to resolve the issues regarding the conditions DWSD sought to impose. U.S. EPA and DWSD were unable to reach agreement, however. Accordingly, on February 28, 1996, U.S. EPA transmitted to DWSD a letter indicating that an impasse had been reached, and that U.S. EPA could not accept a condition requiring indemnification of the DWSD as part of an access agreement. [Attachment "H".]

V. ANTICIPATED DEFENSES

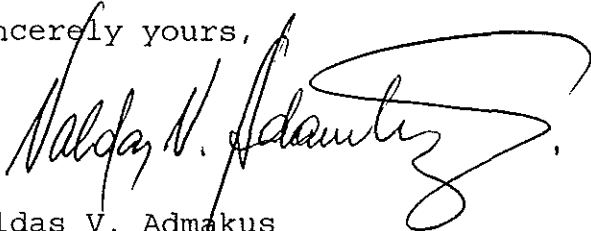
It is anticipated that DWSD will raise the Fifth Amendment issue of compensation for any damage to its property that results after entry.

VI. PROPOSED ACTION

U.S. EPA proposes that the U.S. Department of Justice commence an action in federal district court, as soon as possible, to obtain an order for access to the Site.

If you have any questions concerning this matter, please do not hesitate to call Jeffrey A. Cahn, Associate Regional Counsel, at (312) 886-6670, or Kevin Adler, Remedial Project Manager, at (312) 886-7078.

Sincerely yours,



Valdas V. Admakus
Regional Administrator

Enclosures

cc: Steven A. Herman (LE-133)
Assistant Administrator for Enforcement

Elliot P. Laws (OS-100)
Assistant Administrator for
Solid Waste and Emergency Response

bcc: Jeffrey A. Cahn
Associate Regional Counsel

Kevin Adler
Remedial Project Manager

ATTACHMENTS

- A. Consent Decree, U.S. v. Browning Ferris Industries, et al., 92 CV 75460DT (E.D. Mich., entered June 30, 1993).
- B. Record of Decision, G &H Industrial Landfill Site, December 21, 1990.
- C. Explanation of Significant Differences, G &H Industrial Landfill Site, March 13, 1992.
- D. Application for Encroachment Upon DWSD Easement, November 27, 1995.
- E. Letter request for access from William E. Muno, Director Superfund Division, to Stephen F. Gorden, Director, DWSD, December 11, 1995.
- F. Follow-up letter regarding request for access from William E. Muno, Director Superfund Division, to Stephen F. Gorden, Director, DWSD, February 5, 1996.
- G. Telecopy of DWSD re-write of access agreement (marked-up), from Avery K. Williams to Jeffrey A. Cahn, Associate Regional Counsel, U.S. EPA, dated February 9, 1996.
- H. Letter from Jeffrey A. Cahn, Associate Regional Counsel, U.S. EPA to Avery K. Williams, memorializing end of negotiations for access due to unacceptable conditions, dated February 28, 1996.